SUPREME COURT, U. S.

SEP 10 1968

JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1968

No. 263

RALPH ILOWITE,

Petitioner,

against

UNITED STATES OF AMERICA and the FEDERAL COMMUNICATIONS COMMISSION,

Respondents.

MEMORANDUM OPPOSING SUGGESTION OF MOOTNESS

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Statement

This memorandum is submitted in opposition to the respondent's memorandum suggesting that this case has been mooted by the Commission's decision to grant petitioner's radio license applications pursuant to "a newly adopted policy whereby the Commission will no longer require applicants in the non-commercial services to answer inquiries of the type involved in this case." (Res. Mem. pp. 1-2).

Argument

The Commission's sudden change of its longstanding policy, scrupulously limited and obviously made in response to the present petition, does not adequately resolve the petitioner's claims nor does it reach the underlying issues; in short, a continuing controversy exists.

The jurisdiction of this Court is not divested by the mere cessation of the challenged conduct where the Commission "is free to return to [its] old ways." *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632; *United States* v. *Trans-Missouri Freight Ass'n.*, 166 U.S. 290; *Walling* v. *Helmerich & Payne*, 323 U.S. 37. Respondents have failed to demonstrate "that 'there is no reasonable expectation that the wrong will be repeated.'" *United States* v. *W. T. Grant Co., supra,* at 633. There is no assurance at all that the Commission will not revive its "deeply rooted and long-standing" policy* tomorrow with respect to other applicants and even with respect to petitioner when he seeks to renew his licenses. See *Gray* v. *Sanders*, 372 U.S. 368, 376. The Commission neither disclaims the existence nor the validity of the statutory power underlying the policy which it has heretofore followed. On the contrary, the Commission affirms that power in its very concession to the petitioner by stating merely that it will not, at this time, apply its policy to applications for the type of license involved in this case. The temporary discontinuance of the political interrogation of "non-commercial" license applicants—a distinction whose rationale is not immediately apparent—not only poses a present threat to the rights of other classes of applicants but also to the security of petitioner's licenses.

In challenging the existence and constitutional validity of the Commission's policy of political interrogation, the petitioner

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* The Commission has interrogated applicants for initial and renewal licenses about Communist Party membership or associations for many years. The history of this practice is discussed fully in Emerson, Haber and Dorsen, *Political and Civil Rights in the United States*, 309-313 (1967). Reported challenges to this policy include *Matter of Lafferty*, 23 F.C.C. 761 (1957); *Matter of Pacifica Foundation*, 36 F.C.C. 147 (1964); *In re Application of Dispatch, Inc.*, 22 F.C.C. 1369 (1957); *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (D.C. Cir. 1960), *cert. denied* 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (D.C. Cir. 1960) *cert. denied* 366 U.S. 904; *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (D.C. Cir. 1963).

represents the overriding public interest in preserving the separation of the exercise of legislative and executive powers and in protecting First and Fifth Amendment rights of radio license applicants. See *Greene* v. *McElroy*, 360 U.S. 474, 507; *Shelton* v. *Tucker*, 364 U.S. 479; *Schneider* v. *Smith*, 390 U.S. 17. This public interest is not extinguished by the Commission's new policy, see *Southern P.T. Co.* v. *Interstate Commerce Commission*, 219 U.S. 498; *Liner* v. *Jafco, Inc.*, 375 U.S. 301, 304, and can be and is adequately represented by the petitioner. See *N.A.A.C.P.* v. *Alabama*, 357 U.S. 449, 459. If this court reviews the merits it will have the advantage of a record which reflects full briefing, argumentation and consideration in the court below and which is supplemented by the extensive proceedings in identical, prior cases, *Blumenthal* v. *Federal Communications Commission*, 318 F. 2d 276 (D.C. Cir. 1963); *Borrow* v. *Federal Communications Commission*, 285 F. 2d 666 (D.C. Cir. 1960) *cert. denied* 364 U.S. 892; *Cronan* v. *Federal Communications Commission*, 285 F. 2d 288 (D.C. Cir. 1960) *cert. denied*, 366 U.S. 904.

The respondent does not even offer an adequate procedure for dismissal. While the *res judicata* effect of the decision below will be eliminated if the case is ordered dismissed under the respondents' suggested procedure, in reality the petitioner and other applicants will continue to face a formidable *stare decisis* barrier in any future case involving the issues presented here. This is precisely what happened below where the Third Circuit denied relief to the petitioner on the basis of the *Borrow, Cronan* and *Blumenthal* decisions in the Court of Appeals for the District of Columbia despite the doubts of a majority of the court. If this case is dismissed as moot, the issues now presented by the petitioner, which are admittedly substantial, will have to await settlement

until the petitioner or another applicant travels the long and expensive route to this Court.

CONCLUSION

The writ of certiorari should be granted and the case should be decided on its merits.

Respectfully submitted,

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September 4, 1968